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No. 820

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, CAL CHAPTER, PETITIONER

vs.

CONTINENTAL AIR LINES, INC. AND THE AIR LINE PILOTS ASSOCIATION INTERNATIONAL, AFL-CIO, RESPONDENTS

REPLY BRIEF OF PETITIONER

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

1. In its argument in opposition to this Petition, Respondent Continental sets up a straw man and proceeds to destroy it with considerable vigor. The heart of the opposition by Continental is that Petitioner, CAL Chapter, is merely seeking to obtain a review and reversal by this Court of certain findings of fact by the Court below upon the basis of which that Court made its determination of mootness.

There is no substance whatsoever to this assertion. CAL Chapter says, without qualification, that the decision of the Court below dismissing this suit on grounds of mootness cannot stand even if every finding of fact by the Court below is accepted. This Petition is not directed at the findings of the Court below on the issues the Court considered relevant. It is directed at the failure of the Court to recognize the relevancy of the issues it ignored. The findings of the Court below are devoted exclusively to the issue of whether CAL Chapter was effectively dissolved and

whether the parent organization of that union succeeded in properly establishing a trusteeship. Having found that the dissolution was effective, and that the trusteeship was not effective, the Court simply concluded that "the sole plaintiff and appellant no longer exists," and therefore that "this appeal and case is now moot." (Pet. App. A 30.)

Whether or not those findings are correct, the legal conclusion of mootness is wrong; and it is to that conclusion that this Petition is directed. For the Court below has ignored completely the questions of whether the conduct by Continental which led to the dissolution of CAL Chapter was lawful; whether the dissolution was a direct and natural consequence of a course of unlawful conduct by Continental (particularly the execution of a flight engineer agreement with ALPA and the refusal to continue to recognize and deal with CAL Chapter); and whether, if the consequence of mootness is to prevent remedying statutory violations by Continental, the case can be considered moot. Not a single word in the opinion of the Court below is directed to these critical questions.

Indeed to this day, *no Court* has passed upon the question of whether the conduct of Continental, commencing with the May 29, 1959, contract with ALPA and ending with the strike settlement made with the individual strikers and ALPA on October 10, 1960, violated the Railway Labor Act. And yet, under the decisions of this Court reviewed in the instant Petition, there can be no conclusion of mootness without considering that question. The fact that CAL Chapter, in its Petition for Rehearing below, raised this question and that the Petition was denied, does not demonstrate, as Continental repeatedly asserts, that the Court below ruled upon this question. The denial of the Petition for Rehearing—without reasons or opinion—demonstrates only that the Court below considered the issue of whether Continental had violated the Act to be irrelevant. And that is precisely the error we are asking this Court to correct.

Moreover, the suggestion by Continental (Cont. Br. 4,

7, 10) that in a "prior case" designated as 518-60 (R. 311 ff.) a U. S. District Court had ruled that the conduct of Continental which preceded the strike by the flight engineers was lawful is a complete misrepresentation of the facts. In that case Continental brought suit to enjoin the then threatened strike by CAL Chapter on the ground that the strike would be unlawful because, as Continental alleged, CAL Chapter had not yet completed the procedural requirements and waiting periods that must be followed under the Railway Labor Act before a union may strike. In 518-60 the Court rejected Continental's contention. It ruled that CAL Chapter had satisfied the procedural requirements and waiting periods and that, no unlawful objective of the strike having been claimed or shown, the Union was free to strike. The Court did *not* rule upon the question of whether the conduct *by Continental* which provoked the strike (the refusal to continue to recognize CAL Chapter and the negotiation with ALPA instead of FEIA of a contract affecting flight engineers) was lawful. Having found that a strike by CAL Chapter would in no way violate the law, the Court had no alternative but to deny the injunction, whether the conduct *by Continental* which provoked the strike was unlawful or not. Nothing in the Railway Labor Act makes the legality of a strike turn upon the question of whether the carrier's conduct which caused the strike was lawful.

Despite this, the District Court in the instant case ruled that the decision in 518-60 was res adjudicata of the central issue of the legality of Continental's conduct raised by the instant complaint. From that decision, which CAL Chapter believes was plainly wrong, the appeal was taken to the Court below. However, the Court below did not reach that issue because of its determination that with the subsequent dissolution of CAL Chapter the case became moot.

In the light of these facts, Continental's assertion that CAL Chapter has had its day in court on the question of the legality of the conduct of Continental involved in the instant complaint, let alone that this question has already

been finally decided adverse to the position of CAL Chapter, is nothing less than unbelievable.

2. Continental recognizes the force of those many decisions cited in the Petition which hold that an employer may not claim mootness and thereby take advantage of the dissolution of a union, or the loss of the union's majority status, which comes as the natural consequence of an unlawful refusal to bargain or of other conduct the normal effect of which is to undermine the employees' support of the union. It seeks to escape the impact of those decisions by emphasizing the facts found by the Court below to the effect that the movement to dissolve CAL Chapter started with those of the striking members of CAL Chapter who wished to discontinue the strike, and that Continental entered into the agreement with ALPA and the individual flight engineers settling the strike only after those employees had gone to ALPA and obtained its aid in preparing that agreement.

Even if those findings are accepted as supported by the record, they are of absolutely no consequence in this case. The plain lesson of *Medo Photo Supply Co.* v. *N. L. R. B.*, 321 U.S. 678 (1944), is that: "The statute was enacted in the public interest for the protection of the employees' right to collective bargaining and it may not be ignored by the employer, even though the employees consent . . . or the employees suggest the conduct found to be an unfair labor practice . . ." (321 U.S. at 687).[1] Continental's exe-

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[1] The Court is there speaking of the National Labor Relations Act; but the principle is exactly the same under the Railway Labor Act. *See: Texas & N. O. R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548 (1930). In a decision issued subsequent to the filing of the instant Petition, the Fourth Circuit stated:

> "In cases where an employer's unfair labor practices and refusals to bargain so weakened the union that it no longer represented a majority of the employees, the courts have nonetheless consistently required the employer to cease and desist its unfair labor practices and bargain with the union." (Citation omitted.) *IAM* v. *International Aircraft Services*, ___ F. 2d ___, 49 LRRM 2976 (CA 4), March 21, 1962.

cution of the strike settlement agreement was but the culmination of an unlawful course of conduct, already fully reviewed in the Petition, which began in May of 1959 when Continental first undermined CAL Chapter by agreeing to recognize ALPA instead of continuing to recognize CAL Chapter as the representative of flight engineers, although the flight engineers had in no way changed their designation of representatives. Whether or not Continental directly solicited the dissolution of CAL Chapter, it may not escape a court order remedying that conduct by claiming that what it did is what the employees ultimately were driven to ask for as a direct consequence of that unlawful conduct.[2]

Nor may Continental hide behind the fact that it was ALPA that acted as the agency through which the strike settlement was ultimately arrived at. Where, as a result of an employer's illegal conduct, a union's status as a functioning majority representative is destroyed, the fact that the employees may then turn to another union, rather than attempt to deal on their own, gives the employer no right to deal with that other union. For, under the circumstances, the second union cannot possibly be regarded as the freely designated representative of the employees. Precisely that situation was presented in *National Licorice Co.* v. *N. L. R. B.*, 309 U.S. 350 (1940), as well as in *International Assn. of Machinists* v. *N. L. R. B.*, 311 U.S. 72 (1940). In neither case did this Court permit an employer to escape from the consequences of illegal conduct which led to the

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[2] As the Third Circuit pointed out in a very comparable situation:

"The employees' petitioning of May 25 purporting to withdraw the union's authority as bargaining agent, was the expected harvest which the respondent reaped in due season from what it had theretofore sown and purposefully cultivated until maturity. In no event, could the employer discredit a duly designated bargaining agent by refusing to bargain with it and then avail himself of the bargaining agent's loss of majority support which has thus been brought about by the employer's own conduct." *N. L. R. B.* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, 42 (CA3, 1941). (Citations omitted.)

charging union's loss of its majority by claiming that another union had demonstrated that it was now the representative of a majority of the employees.

This principle is all the more applicable in this case, where the record so plainly shows that the ultimate agreement settling the strike is the product of individual bargaining, a practice that is the antithesis of the kind of collective bargaining required by the Act. *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342 (1944). Continental's assertion (Cont. Br. 10) that the findings of the Court below permit no conclusion that there was individual bargaining, is plainly false. That is precisely what the Court below did find. It found that the strike settlement agreement signed by Continental on October 10, 1960, was also signed "*by ALPA and some of the twenty-two striking flight engineers.* Whether it was actually signed by all of them is in dispute." (Pet. App. A. 25 [Emphasis added].)[3] The Court below then finds (Pet. App. A. 25, fn. 3) that if there were any of the individual flight engineers that did not sign the strike settlement agreement, they accomplished the same purpose by *individually* signing a "(b) or (c) option." These options were agreements directly between the individual flight engineers and Continental. If that is not individual, as distinguished from collective, bargaining, the term has no meaning.

The force of the decisions relied upon in the Petition is unimpaired by anything in Continental's opposition. The applicable principle is crystal clear. A suit to vindicate the right under the Railway Labor Act to collective bargaining by a freely selected representative cannot become moot by virtue of the fact that the carrier's success in trampling on that right manifested itself in a destruction of the union the employees had selected. That principle, so important

[3] The agreement itself refers to "each of the flight engineers who are signatories to this Agreement." See p. 5 of Exhibit 5 attached to affidavit of Roy A. Berry, accompanying the "Motion To Dismiss By Appellee Air Line Pilots Association, International, AFL-CIO" which is on file with the Clerk of this Court.

to any meaningful administration of the Railway Labor Act, was ignored by the Court below.

3. Little need be said about the Brief in opposition to this Petition filed by ALPA. ALPA recites some history designed to suggest that the conduct of Continental in refusing to continue to recognize CAL Chapter as the representative of flight engineers on jet aircraft was motivated by economic considerations which dictated a change in the qualifications required of its flight engineers on jet aircraft. Even if this were true, it is totally irrelevant, and was in no way relied upon for the conclusion of the Court below that is at issue in this Petition. And, aside from that fact, it is too late in the day to suggest that the compliance of a carrier with the duties imposed by the Railway Labor Act are contingent upon economic convenience or necessity.

CONCLUSION

For the reasons spread upon the papers in this case, this Petition should be granted.

Respectfully submitted,

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